BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS OF TRW INC.

Norman P. Leventhal
Raul R. Rodriguez
Stephen D. Baruch

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

Attorneys for TRW Inc.

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SUMMARY

Pursuant to the Omnibus Budget Reconciliation Act of 1993, the Commission proposed in its Notice of Proposed Rule Making ("Notice") in this proceeding to erect a comprehensive framework for the regulation of mobile radio services. Of particular concern to TRW, an applicant for a Mobile Satellite Service/Radiodetermination Satellite Service ("MSS/RDSS"), the Commission tentatively concluded in its Notice that it should continue to use its existing procedures for determining whether to authorize the provision of space segment capacity by satellite systems on a non-common carrier basis.

Among the parties who commented on this proposal, there was nearly unanimous agreement that non-common carrier treatment for the provision of space segment capacity would be appropriate. The suggestion of the one disagreeing commenter that resellers of space segment capacity, and not satellite system licensees, should be exempted from common carrier regulation is inconsistent with Section 332. It also contravenes a long list of prior Commission decisions, and with the Commission's recent order allowing space station licensees in the new Non-Voice, Non-Geostationary MSS to offer space segment capacity to commercial mobile service providers on a non-common carrier basis. The Commission should therefore authorize non-common carrier

treatment for the provision of space segment capacity by MSS/RDSS licensees to parties other than "end users."

In its attempt to define the statutory elements of "commercial mobile service," TRW urges the Commission to adopt the views of the many parties who interpreted those elements narrowly, and who interpreted the definition of private mobile service broadly. TRW agrees with those parties who view "interconnected service" as providing a subscriber with the ability to access freely the public switched network via the mobile service network for real-time, two-way communication, and urges the Commission to determine that any service that meets the definition of a commercial mobile service, but is not the "functional equivalent" of a commercial mobile service, must be considered a private mobile service.

TRW concurs with those parties who urge the Commission to take an ad hoc, service-by-service approach to the classification of mobile services as either "commercial" or "private," and to allow individual licensees to choose whether to provide commercial or private mobile service without regard to frequency assignment. Such a flexible approach is necessary so as not to discourage diversity in applications for services.

Next, the Commission should accede to the views of an overwhelming majority of commenters and forbear from applying most provisions of Title II to commercial mobile services. In

particular, the Commission should recognize that the abuses that TOCSIA was designed to prevent have not arisen in the mobile services context.

Finally, the Commission should preempt state regulation of the right to, type of, and rates for intrastate interconnection of MSS/RDSS to Local Exchange Carriers, and should disregard state public utility commissions' comments to the contrary. It should also embrace the position of those parties that urge the Commission to order physical interconnection between commercial mobile service providers and other mobile services.

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TRW Inc. ("TRW"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby replies to various comments submitted pursuant to the Commission's Notice of Proposed Rulemaking in the above-captioned docket, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 93-454 (released October 8, 1993) ("Notice"). In the Notice, the Commission proposed to give effect to Sections 3(n) and 332 of the Communications Act of 1934 ("the Act"), as amended by the Omnibus Budget Reconciliation Act of 1993,[1/] by erecting a comprehensive regulatory framework for mobile radio services.

1/ Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) (to be codified at 47 U.S.C. §§ 153(n) and 332) (hereinafter "47 U.S.C. §§ 153(n) and 332").

The Commission tentatively concluded, inter alia, that it should continue to use its existing satellite-industry procedures in order to authorize mobile satellite service ("MSS") operators to offer space segment capacity for the provision of mobile service on a non-common carrier basis.[2/]

I. INTRODUCTION

In response to the Notice, 78 parties -- including TRW -- filed comments in this proceeding.[3/] The filing parties expressed a wide range of views on the regulatory approach that the Commission should take to the various matters raised in the Notice. One area of relative harmony among the comments, however, was the appropriate regulatory treatment of mobile satellite services.

Of the parties who commented on the regulation of the provision of space segment capacity for use in providing mobile

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2/ Notice, FCC 93-454, slip op. at 16.

3/ TRW is an applicant for a satellite system that would operate on a global basis in the new Mobile Satellite Service/Radiodetermination Satellite Service ("MSS/RDSS"). See Application of TRW Inc. (File Nos. 20-DSS-P-91(12) and CSS-91-015).

service,[4] only one took a position inconsistent with TRW's support for the Commission's use of its existing procedures to authorize satellite system operators to offer such capacity on a non-common carrier basis. Although several parties indicated that the provision of mobile satellite services should be regulated as commercial mobile service[5] -- a limited view that is consistent with TRW's call for treatment only of MSS provided to "end users" as commercial mobile service -- only Rockwell International Corporation ("Rockwell") went so far as to call for the regulation of the provision of space segment capacity to mobile satellite service providers as commercial mobile service.[6]

As TRW explained in its Comments, the Commission has authorized satellite systems in many different services to offer

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4/ See Comments of Motorola, Inc. ("Motorola") at 14; Comments of the Public Service Commission of the District of Columbia ("D.C. Public Service Commission") at 8; Comments of the NYNEX Corporation ("NYNEX") at 17; Comments of Vanguard Cellular Systems, Inc. ("Vanguard") at 12.

5/ See, e.g., Comments of the Cellular Telecommunications Industry Association; Comments of Mobile Telecommunication Technologies Corp. ("MTel") at 11; Comments of Pacific Bell and Nevada Bell ("Pacific Bell and Nevada Bell") at 5; Comments of Arch Communications Group, Inc. ("Arch") at 9.

6/ Comments of Rockwell International Corporation ("Rockwell") at 4-5.

space segment capacity on a non-common carrier basis.[7/] In Section 332, Congress authorized the Commission to do the same for mobile satellite service.[8/] With regard to the new MSS/RDSS, TRW demonstrated that such regulatory treatment would be consistent with the public interest.[9/] In light of these facts and of the strong support for TRW's position voiced by the other commenting parties, TRW urges the Commission to authorize MSS/RDSS licensees to offer space segment capacity to mobile service providers on a non-common carrier basis.

On other matters affecting the regulatory treatment of mobile service in general, the positions of the commenters were

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7/ See, e.g., Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238 (1982), aff'd sub nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984); Martin Marietta Communications Systems, Inc., 60 R.R.2d 779 (1986); Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985) ("Separate Systems"), recon. granted in part, 61 R.R.2d 649, further recon. denied, 1 FCC Rcd 439 (1986); Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, 104 F.C.C.2d 650 (1986); Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service, FCC 93-478 (released November 16, 1993) ("NVNG MSS Order").

8/ See 47 U.S.C. § 332(c)(5) ("Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage").

9/ See Comments of TRW ("TRW") at 12-15.

more divergent. The commenters expressed a variety of views, for example, on the appropriate definitions of the various elements of commercial mobile service, on the parameters of commercial mobile service versus private mobile service, on the extent to which the Commission should preempt state regulation of mobile services, and on the proposed requirement that mobile service providers offer interconnection to one another. Once the vested interests of the commenters are taken into account, however, it is clear that there is widespread agreement on the objective basis for the regulatory approach to MSS/RDSS that TRW outlined in its Comments. TRW therefore respectfully requests that the Commission treat the new and promising MSS/RDSS industry in accordance with TRW's proposals.

II. THE COMMISSION SHOULD MAINTAIN ITS EXISTING PROCEDURES FOR AUTHORIZING MSS LICENSEES TO OFFER SPACE SEGMENT CAPACITY ON A NON-COMMON CARRIER BASIS.

A. The Commenters Overwhelmingly Favor Treatment Of The Provision Of Space Segment Capacity To Mobile Service Providers As Non-Common Carriage.

The parties who commented on the regulation of the provision of space segment capacity by satellite system licensees were in nearly unanimous agreement that such activity should be

treated on a non-common carrier basis.[10/] Although a number of parties opined in passing that mobile satellite service should be regulated as commercial mobile service, their comments, taken in context, appear to be focused on the provision of MSS to end users; they did not reference, and clearly did not attempt to challenge, the Commission's tentative conclusion that it should use its existing procedures to authorize satellite licensees to offer system capacity on a non-common carriage basis.[11/]

The comments filed by American Mobile Satellite Corporation ("AMSC") are illuminating in this regard. AMSC stated that it was "supporting the inclusion of satellite services among those to be regulated as commercial mobile service."[12/] It clarified, however, that such a classification was only to apply "to the extent that those services are provided to end users."[13/]

10/ See Motorola at 14; D.C. Public Service Commission at 8; NYNEX at 17; Vanguard at 12.

11/ See, e.g., Mtel at 11 (urging that "mobile services authorized pursuant to Parts 22 and 25 of the Commission's rules, including cellular, air-ground, paging and satellite services, be classified as commercial mobile service"); Arch at 9 (stating that "the mobile satellite service regulated under Part 25 . . . would qualify" as commercial mobile services.)

12/ Comments of AMSC Subsidiary Corporation ("AMSC") at 5.

13/ Id. (emphasis added).

Of particular significance is the Commission's recently-released NVNG MSS Order. In that decision, the Commission had its first opportunity to address the interplay between Section 332 of the Act and a new mobile satellite service.[14/]

In deciding that NVNG MSS space station licensees would be permitted to operate on a non-common carrier basis, the Commission observed that Section 332(c)(5) of the Act "states that the Commission may continue to determine whether the provision of space segment capacity by satellite systems to [commercial mobile services] providers should be treated as common carriage."[15/] It found that NVNG services "are not inherently common carrier in nature under the guidelines of the NARUC I decision[,]" and concluded that it "will not require NVNG space station licensees to provide system access to CMS providers on a common carrier basis."[16/] It further determined to

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14/ See NVNG MSS Order, FCC 93-478, slip op. at 14-15. The Non-Voice Non-Geostationary ("NVNG") MSS, like the MSS/RDSS, would consist of constellations of satellites in nongeostationary orbits that would provide MSS services on an inherently global basis.

15/ Id. at 15 (footnote omitted).

16/ Id. (citing National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 999 (1976) ("NARUC I")).

subject those NVNG space stations that elected to operate on a common carrier basis (an election afforded by the new rules) and NVNG MSS earth stations (which would be treated as common carriers to the extent that they fall within the definition of commercial mobile services providers under the rules to be adopted in the instant proceeding) to "streamlined" regulation in order to "ease the regulatory burden on NVNG licensees, without harm to the public interest."[17/]

In view of the fact that the NVNG MSS and MSS/RDSS services are similar -- at least to the extent that space station licensees in each service would offer MSS space segment capacity to parties who would provide services that may be commercial mobile services to end users -- the Commission's determination to allow NVNG MSS operators to be licensed on a non-common carrier basis (with the range of opportunities that designation entails for securing of external financing and foreign market opening opportunities) is a watershed event. The Commission should follow the precedent established in the NVNG MSS Order in this proceeding, and implement the proposals it made in its Notice for the MSS/RDSS.

17/ Id. The Commission noted that the issue of forbearance from tariff regulation for commercial mobile service providers was under consideration in this proceeding. Id.

B. Rockwell's Proposed Regulatory Scheme Would Subvert The Will Of Congress And Turn The Concept Of Common Carriage On Its Head.

Rockwell was alone among all the commenters in suggesting that the Commission alter its existing procedures for authorizing satellite licensees to offer system capacity for the provision of mobile services. Rockwell argued that the Commission should not exempt satellite system licensees from common carrier classification in order to protect their ability to tailor services to meet their customers' needs.[18/] Claiming that resellers of space segment capacity have a greater need for regulatory flexibility than satellite licensees because resellers have to "package the end-to-end service in a manner that is customized for different users," Rockwell suggested that resellers, and not satellite system licensees, should be exempted from common carrier regulation.[19/]

Rockwell's contention that satellite systems should be exempted from common carrier regulation only to the extent that they provide service directly to end users is starkly inconsistent with the long line of cases cited in note 7, supra;

18/ Rockwell at 5.

19/ Id.

in particular, it is completely invalidated by the actions taken in the new NVNG MSS Order discussed in Section II.A. Rockwell's approach would also subvert the intent of Congress as expressed in the 1993 amendments to the Act. The Act, as amended, clearly provides that "nothing in [Section 332] shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage."[20/] Thus, the Commission has the discretion to continue to regulate the provision of space segment capacity as non-common carriage.

The Commission does not enjoy similar discretion insofar as the provision of MSS to end users is concerned. The legislative history of Section 332 provides that "the provision of space segment capacity directly to users of commercial mobile services shall be treated as common carriage."[21/] In other words, when a "capacity reseller" packages "end-to-end service" for end users, as in Rockwell's scenario, the Commission has no

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20/ 47 U.S.C. § 332(c)(5) (emphasis added).

21/ H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) ("Explanatory Statement") (emphasis added), reprinted in 1993 U.S.C.C.A.N. (107 Stat.) 1088, 1183.

choice but to treat the capacity reseller as a common carrier.[22/]

For whatever reason, Rockwell appears to be frustrated at the Act's requirement that providers of commercial mobile services to end users are to be treated as common carriers, and is attempting to vent its frustration by challenging the basis for the Act's express dispensation for providers of MSS capacity to non-end users. If it could be found consistent with the new statutory scheme, TRW would certainly endorse a Commission finding that a mobile service provider (whether serving end users via satellite or otherwise) is providing a non-common carrier service. Rockwell simply is wrong, however, in its view that the

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22/ Rockwell's proposed regulatory scheme would turn the time-honored concept of common carriage on its head. Under NARUC I, a case long cited by the Commission for its definition of common carriage, "the characteristic of holding oneself out to serve indiscriminately appears to be an essential element" of common carriage. NARUC I, 525 F.2d at 642. An entity will not be a common carrier "where its practice is to make individualized decisions, in particular cases, where and on what terms to deal." Id. at 641. Satellite system operators must of necessity make "individualized decisions" of the type described by the court in NARUC I in selling space segment capacity to mobile service providers. A mobile satellite service provider who offers its services indiscriminately to end users (even if it packages its offerings differently for particular broad classes of end users) does not make such decisions, however, and therefore much more closely fits the NARUC I court's description of a common carrier. The Commission has no choice but to reject Rockwell's arguments that providers of space segment capacity who serve mobile service providers should be regulated as common carriers.

Commission's inability to make such a determination requires that all providers of MSS capacity to resellers must be treated as common carriers.

C. The Commission Should Define "End Users" Of Commercial MSS In Accordance With Section 332(d)(1).

In its Notice, the Commission tentatively concluded that a satellite system licensee who "opts to provide commercial mobile service directly to end users . . . shall be treated as a common carrier."[23/] The Commission further proposed that the "provision of commercial mobile service to end users by earth station licensees or providers who resell space segment capacity" be treated as common carrier service.[24/] As TRW noted in its Comments, the Commission did not define the term "end users."

TRW proposed that the Commission define "end users" as the customers of commercial mobile service, in accordance with Section 332(d)(1). Specifically, it called upon the Commission to clarify that the term "end users" should be equated with the statutory terms "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the

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23/ Notice, FCC 93-454, slip op. at 16-17.

24/ Id. at 17.

public."[25] No commenter expressed a view inconsistent with TRW's proposal.[26]

TRW submits that its proposed definition of "end users" is both logical and consistent with the intent of Congress. Any definition of "the public" or "a substantial portion of the public" must comport with the term "end users" as employed by the Commission in its discussion of satellite services.[27]

D. The Commission Should Not Treat Resellers Of MSS Space Segment Capacity As Common Carriers Unless They Provide Service Directly To End Users.

In its Comments, TRW requested clarification from the Commission that a reseller of MSS space segment capacity would not be regulated as a common carrier if it resold that capacity to another reseller rather than to an "end user."[28] No

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[25] TRW at 22.

[26] Motorola agreed with TRW's definition, stating that it is the gateway earth station operators, and not the providers of space segment capacity, who would be offering "interconnected service" to a "substantial portion of the public," and who thus would be potentially subject to common carrier regulation. Motorola at 19.

[27] Notice, FCC 93-454, slip op. at 16-17.

[28] TRW at 23-24. TRW observed that the Commission's statement that it "will not exempt resellers of mobile-satellite service space segments from the Act's common carriage requirement" (Notice, FCC 93-454, slip op. at 17 n.62) is inconsistent with its statement (in the text of the same

(continued...)

commenting party expressed an opinion inconsistent with TRW's proposal.

Indeed, Reed, Smith, Shaw & McClay ("Reed, Smith") offered further support for TRW's views.[29] As did TRW, Reed, Smith observed that the Notice could be construed as conveying the Commission's intent to classify resellers of commercial mobile service as providers of commercial mobile service, without regard to whether they satisfied any of the criteria of commercial mobile service set forth in 47 U.S.C. § 332(d)(1).[30]

In disputing the impression created in footnote 62 of the Notice, Reed, Smith noted that one of the criteria of "commercial mobile service" is that such service must be offered to "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public."[31] It stated that because "a reseller of mobile-

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[28] (...continued)
paragraph) that "provision of commercial mobile service to end users by earth station licensees or providers who resell space segment capacity would be treated as common carrier service." Id. at 17 (emphasis added).

[29] Comments of Reed, Smith, Shaw & McClay ("Reed, Smith") at 5.

[30] Id.

[31] Id. (citing 47 U.S.C. § 332(d)(1)).

satellite services may offer its services to a narrow class of users, and therefore not to a substantial portion of the public, [the Commission's] analysis is faulty under section 332(d) and clearly conflicts with the intention of the statute."[32/] TRW agrees that, in the absence of a sale or resale of MSS space segment capacity to "end users," a reseller of mobile-satellite services should be classified as a provider of private mobile service.[33/]

III. THE COMMISSION SHOULD DEFINE COMMERCIAL MOBILE SERVICE NARROWLY AND PRIVATE MOBILE SERVICE BROADLY SO AS TO ENCOURAGE COMPETITION AMONG ALL MOBILE SERVICES.

The statutory elements of the definition of "commercial mobile services" engendered much comment, but no consensus. Although TRW's views on certain components of the definition are expressed in its comments and amplified upon below, TRW generally supports the views of those parties who urge the Commission to interpret the various elements of the definition of commercial mobile service narrowly, and to define private mobile service broadly. A minimalist approach to mobile services regulation

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32/ Reed, Smith at 5.

33/ As TRW noted in its Comments, however, there may be instances where MSS may be provided directly to "end users," but still not constitute a commercial mobile service. TRW at 24.

will encourage competition among the mobile services, many of which are still on the drawing boards, and thereby enhance the growth of a healthy mobile satellite services industry.

A. "Interconnected Service" Must Be Defined To Involve Open Access To The PSN Via A Mobile Service For Real-Time, Two-Way Communications.

There was considerable disagreement among the commenters as to the proper definition of the term "interconnected service" -- a key component of the definition of "commercial mobile service" under 47 U.S.C. § 332(d)(1). TRW agrees with the Commission that "Congress intended by its use of the term "interconnected service" to distinguish between those communications systems that are physically connected with the [public switched] network and those systems that are not only interconnected but that also make interconnected service available."[34/] TRW also supports the Commission's proposal to use the "traditional" definition of the term "public switched network" ("PSN").[35/]

34/ Notice, FCC 93-454, slip op. at 5.

35/ Id. (defining the public switched network as synonymous with the "public switched telephone network," i.e., "the local and interexchange common carrier switched network, whether by wire or radio.") Many commenters support TRW's view. See, e.g., Comments of National Association of Business and (continued...)

TRW further supports the view, advocated by Pagemart, Inc. ("Pagemart"), that a mobile service will qualify as an "interconnected service" only if it provides a subscriber with:

> "the ability to access freely the PSN via the mobile service network for real-time, generally two-way communication. Mobile services that employ the PSN in an ancillary fashion -- e.g., as a means of supporting only a particular element of the service provided -- are not offering "interconnected service" in the statutory sense."[36/]

Pagemart's interpretation is consistent with the Senate's view that "interconnected service must be broadly available" to meet the statutory standard; the Conference Committee chose to adopt that view instead of the House's understanding that only "one aspect" of the service need be interconnected.[37/]

35/ (...continued)
Educational Radio, Inc. ("NABER") at 8. TRW disagrees with the views of several commenters who believe that the term "PSN" should be defined so broadly as to include non-traditional communications systems. See, e.g., Comments on the Notice of Proposed Rulemaking ("Nextel") at 10-11; Comments of the New York State Department of Public Service at 6. The inclusion of such alternative or complementary systems within the definition of the PSN would inhibit the flexibility and reduce the incentive of mobile service providers to fashion innovative communications solutions that are free from the regulatory constraints associated with the traditional common carrier network.

36/ Comments of Pagemart, Inc. ("Pagemart") at 5.

37/ Explanatory Statement at 496; Pagemart at 5 & n.13. See also Comments of RAM Mobile Data USA Limited Partnership ("RMD") at 3-5; NABER at 8. MTel urges the Commission to define "interconnection" through the use of its Separate
(continued...)

B. Any Mobile Service That Is Not The Functional Equivalent Of Commercial Mobile Service Should Be Considered Private Mobile Service.

The commenters were sharply divided on the question of whether a service that meets the definition of a commercial mobile service, but is not the "functional equivalent" of a commercial mobile service, should be considered a private mobile service.[38/] In its Comments, TRW argued that a service which is not the functional equivalent of a commercial mobile service should be regulated as a private mobile service, even if it falls

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37/ (...continued)
Systems decision, arguing that "interconnection is deemed to exist where an incoming call 'terminates in a computer that can store and process the data and subsequently retransmit it over that network.'" MTel at 6 & n.9 (quoting Separate Systems, 101 F.C.C.2d at 1101). TRW agrees with Pagemart that "[t]he separate systems policy and its underlying rationale have nothing whatsoever to do with the instant case." Pagemart at 6. See also RMD at 3-5. The "interconnection" restrictions embraced in the Separate Systems decision were required by the Executive Branch and the Commission in order to safeguard national interests and fulfill obligations to which the U.S. was subject under Article XIV(d) of the INTELSAT Agreement. Furthermore, the Commission has since substantially relaxed the "interconnection" restrictions on separate satellite systems (and lifted the particular restriction sought by MTel) without affecting the non-common carrier status of the separate systems. See Pagemart at 6 & n.16; Permissible Services of U.S. Licensed International Communications Satellite Systems Separate From the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992).

38/ 47 U.S.C. § 332(d)(3); Notice, FCC 93-454, slip op. at 10-12.

literally within the definition of a commercial mobile service.[39/] In other words, TRW called for the Commission to interpret the term "commercial mobile service" as narrowly as possible under the new statute, in order to avoid imposing unnecessary regulatory burdens on service providers and on the Commission.

Support for TRW's interpretation can be found, inter alia, in the Comments of RMD. Noting the facial ambiguity of 47 U.S.C. § 332(d)(3), RMD examined the statute's legislative history and observed that "Congress intended 'functional equivalent' to limit, rather than expand, the category of commercial mobile service."[40/] As RMD concluded, the Conference Committee's example of a service that meets the definition of a commercial mobile service yet is not the functional equivalent of such a service demonstrates that Congress wished to narrow the commercial mobile services category.[41/] In addition, RMD notes that both the House and Senate versions of Section 332 define "commercial mobile service" narrowly and state that any mobile service that does not meet the

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39/ TRW at 15-16 & n.33.

40/ RMD at 5.

41/ Id. at 6 (citing Explanatory Statement at 496).